No. 249.

SUPREME COURT U. S.
MAR 12 1900
JAMES H. MCKENNEY,
Clerk.

Brf. of Waggoner & Norton for

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed Mar 12, 1900.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company,
Plaintiff in Error,
vs.
OTTO J. MORASCH and ELIZA MORASCH, as next of kin of IRENE MORASCH, deceased,
Defendants in Error.

No. 249.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR PLAINTIFF IN ERROR.

B. P. WAGGENER and
ALBERT H. HORTON,
Attorneys for Plaintiff in Error.

Woodhouse & Schaser, Printers, Atchison, Kansas.

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BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

On September 26th, 1888, the city council of Kansas City, Kansas, passed an ordinance, which reads as follows:

" ORDINANCE NO. 522.

An Ordinance to regulate the running of locomotives and cars in the City of Kansas City.

Be it ordained by the Mayor and Councilmen of the city of Kansas City :

SECTION 1. It shall be the duty of every engineer or other person engaged in running a locomotive to ring the bell attached to such locomotive, whenever the same shall be moving through the city.

SEC. 2. It shall be unlawful for any such engineer, conductor or other persons having a railway engine or train of cars in charge to permit same to be run along any track in said city at a greater speed than six miles an hour.

SEC. 3. It shall be unlawful for any locomotive to be run within this city in such a manner as to hinder or interfere with any funeral procession.

SEC. 4. It shall be unlawful for any person running or controling any locomotive to sound the whistle thereof or allow the same to be sounded within the corporate limits of this city except to prevent accidents that can not otherwise be arrested, and to start and stop the train.

SEC. 5. It shall be unlawful for any person running or controlling any locomotive to allow steam to escape from the cylinder cocks.

SEC. 6. It shall be unlawful for any engineer, conductor or other person managing or controlling any locomotive or train of cars to run the same backwards or cause to be so run in or through said city, without providing for a watchman or other person on rear end of such train in order to avoid accidents.

SEC. 7. Any person violating any of the foregoing sections, or the provisions of any of them therein contained, upon conviction before the police judge, shall be fined in the sum not exceeding one hundred dollars.

SEC. 8. The provisions of this ordinance shall not apply to the Inter-State Rapid Transit Railway Company, excepting with reference to funeral or other processions.

SEC. 9. This ordinance shall take effect and be in force from and after its publication in the Kansas Pioneer.

Passed in Council, September 26, 1888.

J. J. MOFFITT, City Clerk.

Approved September 27, 1888.

THOMAS F. HANNON, Mayor."

Record, 59.

This ordinance attempts to forbid "any engineer, conductor or other person having a railway engine or train of cars in charge, to run along any track in said city at a greater speed than six miles an hour."

Record, 59.

Section 8 thereof reads as follows:

"The provisions of this ordinance shall not apply to the Inter-State Rapid Transit Railway Company, except with reference to funeral or other processions."

Record, 59.

Kansas City, Kansas, is a city of the first class.

Vol. 1, Gen. Stat. of Kan. 1897, ch. 32, p. 337.

This action was originally brought in the District Court of Wyandotte county in the state of Kansas, on May 21st, 1895, by Otto J. and Eliza Morasch, the father and mother of Irene Morasch, to recover $6,000 as dam-

ages and costs against Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, for the death of Irene Morasch, an infant about 22 months old, caused, as alleged, by a train operated by the Receiver running upon and over the infant. The accident occurred about 10 o'clock, a. m., on June 16, 1893, between Seventeenth and Eighteenth Streets in the extreme western part of Kansas City, Kansas, a very thinly populated portion of that city.

Record, 9-11.

The petition filed in the said District Court of Wyandotte county by defendants in error, alleged, *inter alia:*

"Plaintiffs aver that the death of the said Irene Morasch was occasioned by reason of the recklessness, wantonness and negligence of the said defendant in the operation of said railroad engine and cars, and by reason of the recklessness, carelessness and wantonness of the servants of the said defendants in charge of said train and cars; that the said train of cars was being driven and run at a high and dangerous rate of speed at the time of said accident through and within the corporate limits of said city of Kansas City, contrary to the ordinances of said city in such case made and provided, and that the said plaintiffs have been damaged by reason of the matters and things herein alleged, in the sum of six thousand dollars."

Record, 11.

Otto J. and Eliza Morasch, the father and mother of Irene, prior to the time of the accident, lived in a house in Kansas City, Kansas, about 125 feet south of the railroad track. The railroad was north of their house. The accident happened on the railroad track back of the house of the defendants in error, and not far from the

lot on which the house was situated. The trains of the railroad passed to and fro every day frequently on the track back of the house of defendants in error.

Record, 19–20.

There was a rear door to the house of Otto J. and Eliza Morasch, and there were about three lots between the house and the path that led to Stewart Avenue, where the path ran from the avenue to the track, with high weeds on both sides.

Record, 22.

Back of the house, about 125 feet, the Kansas City, Wyandotte & Northwestern railroad was operated. The Inter-State Rapid Transit Railway operated its line about 100 feet in front of the house of Otto J. and Eliza Morasch.

Record, 28.

Otto J. Morasch testified that this road was more dangerous than the Kansas City, Wyandotte & Northwestern railroad.

Record, 28.

He testified, among other things:

"Q. So you had a train in front of you, and one at the rear?

A. Yes sir.

Q. Had you ever said anything to it, (the child), about going upon the railroad track?

A. No sir."

Record, 28.

"Q. It was on the private right of way of the company, wasn't it?

A. Well, I don't know whether that is a street going where that path is or not.

Q. I know, but there is no street crossing ?

A. There is no street crossing there.

Q. There has never been a street opened up there ?

A. No sir, not Eighteenth street is opened up.

Q. I mean a street running the way the track runs?

A. No ; there is no street opened up.

Q. There is no way to drive or walk ; there are deep cuts and high embankments there, are there not ?

A. Yes."

Record, 23.

William Richardson, the engineer of the train operated by Newman Erb as receiver of the railroad company, testified as a witness for the defendants in error, *inter alia*, as follows :

"Q. Was there any public crossings or public ground at this place where this accident happened ?

A. No sir ; the street ain't cut through there—Seventeenth street ain't cut through. Eighteenth street was probably 100 feet from there, west of there.

Q. This accident occurred on the private right of way of the company?

A. Yes sir."

Record, 37.

"Q. From which side of the track did this child come?

A. The left side.

Q. Now, how far do you say that child was from you when you first discovered the object ?

A. About six or seven rail-lengths, probably 150 or 160 feet when I first seen it.

Q. Where was the object then ?

A. Coming up the side of the track in the weeds; come out of the weeds. There are weeds about four feet from the tie; there are some weeds along the track; near the ties there were no weeds.

Q. How far was the object from the track, when you first saw it ?

A. About four or five feet.

Q. That was on the left hand side from you ?

A. Yes sir.

Q. Now, how near to that child was you when you first discovered it on the track ?

A. Well, about 70 or 80 feet, not quite three rail-lengths.

Q. When you first discovered it on the track ?

A. Yes sir, on the track.

Q. Now, at that time, what did you do ?

A. I put my air on, shut the engine off, and reversed her as quick as I could.

Q. Was there any thing else you could have done at that time to have stopped that train ?

A. No sir, I done everything I could.

Q. Was it possible to stop the train with the appliances then at hand, and prevent that collision ?

A. No sir; no way to prevent it.

Q. As you went up that road, did you keep a constant lookout for objects on the track ?

A. Yes sir.

Q. Were you in your proper place ?

A. Yes.

Q. Looking ahead ?

A. Yes sir.

Q. Where was the flreman ?

A. He was ringing the bell on his side.

Q. Was the whistle blown ?

A. Yes sir.

Q. For what distance was that bell rung from the time you started from the depot in the city up ?

A. Continually, all the time.

Q. Continuously through the city ?

A. Yes sir."

Record, 36-37.

The defendants in error upon the trial in said District Court of Wyandotte county, offered evidence tending to prove that the engineer of the train running over the infant Irene violated ordinance No. 522, regulating the running of locomotives and cars in Kansas City, by permitting the engine and train of cars in his charge to run from 12 to 15 miles per hour in passing through Kansas City.

Record, 35 ;

Record, 40.

The trial court charged the jury, *inter alia*, as follows :

"If the jury find from the evidence that the injuries

complained of, and which resulted in the death of the said Irene Morasch were caused within the corporate limits of the city of Kansas City, Kansas, and at the time there was an ordinance of said city prohibiting the running of trains within said city at a greater rate of speed than six miles an hour, and do further find that at said time the servants and employes of the defendant were running the train by which said injuries were occasioned at a much greater rate of speed than six miles an hour, and that while so running said train, ran upon and over the said Irene Morasch, by reason of which she was killed, such act of the persons in charge of said train is evidence of negligence on the part of said defendant, and if you further find that but for such speed of said train so running in excess of six miles an hour, said train could have been stopped by the engineer in charge thereof, after he saw the said child upon the track, or by the exercise of ordinary care and prudence could have seen her upon such track and before the engine would have reached her, then said defendant will be liable for the injuries so received, unless you further find that said plaintiffs were also negligent in permitting said child to be upon said railroad track at said time.

Given by the court. Defendant excepts."

Record, 76.

The jury answered, among other questions, the following:

"Q. 19. At said time were each the engineer and fireman in their proper place on said engine and looking ahead in the direction said engine was moving?

A. Yes.

Q. 20. At said time was the bell on the engine ringing, and had it been ringing continuously a long distance east of where said child was?

A. Yes."

Record, 80.

The jury found that the only reason the engineer and fireman failed to stop the train after they discovered the child on the track and just before the accident, was their failure to run the train "at a limited rate of speed."

Record, 80.

A verdict and judgment of $1,020.00 and costs were rendered December 19th, 1893, for defendants in error. Thereupon, proceedings in error to the Court of Appeals of the State of Kansas were taken, in accordance with the provisions of the statute of that state, and the judgment was affirmed on September 17th, 1898.

In the Court of Appeals, plaintiff in error asserted that Ordinance No. 522 was unconstitutional and void, as violative of the Fourteenth Amendment to the Constitution of the United States, which provides that "No state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,"—because said ordinance arbitrarily excluded from its operation the Inter-State Rapid Transit Railway Company and all engineers and other persons operating the trains of such company in Kansas City, Kansas, and included the engineers and all other persons engaged in operating or running locomotives and trains of all other railroads.

Record, 59.

The Court of Appeals denied the right claimed, and decided, *inter alia* :

"It is further contended that the ordinance is obnoxious to the provisions of the Fourteenth Amendment to the Constitution of the United States. This contention cannot be sustained."

Record, 90.

Erb vs. Morasch, 54 Pac. Rep., 323.

In Kansas, the court of last resort is the Supreme Court. Section 1 of Article 3 of the Constitution of that State ordains that—

"The judicial power of this state shall be vested in a Supreme Court, District Courts, Probate Courts, Justices of the Peace, and such other courts inferior to the Supreme Court as may be provided by law; and all courts of record shall have a seal, to be used in the authentication of all process."

Vol. 1, Gen. Stat of Kan., 1897, p. 61.

Under the statutes of Kansas, proceedings in error may be taken from the judgment of the Court of Appeals to the Supreme Court of the state, in any case involving the Constitution, laws or treaties of the United States.

Sec. 31, Ch. 84, Vol. 2, Gen. Stat. of Kan., 1897, p. 37.

In accordance with the provisions of the statutes of Kansas, the plaintiff in error took the case on error from the Kansas Court of Appeals to the Supreme Court of the State of Kansas.

Record, 94–95.

In that court, plaintiff in error also contended that

the case involved the Constitution and laws of the United States, and asserted a claim and right founded upon the Constitution and laws of the United States. The Supreme Court of Kansas in that case denied the right claimed.

Record. 98–101.

Erb vs. Morasch, 60 Kan., 251.

That court held that ordinance No. 522 of Kansas City, Kansas, regulating the running of locomotives and cars in Kansas City, and excepting from its provisions the Inter-State Rapid Transit Railway Company, did not infringe upon the provisions of the Fourteenth Amendment to the Constitution of the United States, which provides that "No state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Record, 100.

And further decided "that the said legislation (ordinance No. 522) enacted by the city council of Kansas City, Kansas, is not obnoxious to the provisions of the Fourteenth Amendment to the Constitution of the United States."

Record, 100-101.

Erb vs. Morasch, 60 Kan., 251-256.

It will therefore be noticed that the constitutionality

of ordinance No. 522 was directly raised in the Supreme Court of the State of Kansas, and that the right claimed by plaintiff in error founded upon the Fourteenth Amendment to the Constitution was denied.

II.

Specification of the Errors Relied Upon.

Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, duly appointed, qualified and acting as such receiver and an officer of the circuit court of the United States for the district of Kansas, plaintiff in error, in connection with his petition for writ of error, says that in the record and proceedings in said cause there is manifest error in the particulars following, to-wit:

"1. The Supreme Court of the State of Kansas erred in

dismissing said case and thereby affirming the judgment of the Kansas court of appeals, northern department, eastern division, and thereby affirming the judgment of the district court of Wyandotte county, state of Kansas, and in refusing to grant a rehearing on the petition of said plaintiff in error.

2. The said supreme court of the State of Kansas erred in refusing to give and grant in said cause the power, rights and authority which the said Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company and as an officer of the circuit court of the United States for the district of Kansas, was authorized and empowered by said Federal court to possess, enjoy, and exercise; and the said supreme court of the state of Kansas erred in deciding, notwithstanding the provisions of the fourteenth amendment to the Constitution of the United States, that ordinance No. 522 of the city of Kansas City, entitled "An ordinance to regulate the running of locomotives and cars in the city of Kansas City," and approved September 27th, 1888, was valid and constitutional and not in conflict with said fourteenth amendment to the Constitution of the United States.

3. The Supreme Court of the State of Kansas by its decision herein annulled and destroyed the power and authority of the plaintiff in error, Newman Erb, as receiver, as aforesaid, duly appointed, qualified, and acting under the power and authority of the circuit court of the United

States in and for the district of Kansas, which he was empowered to exercise as such Federal officer, as aforesaid.

4. The said Supreme Court of the State of Kansas erred in ruling and deciding in said case that ordinance No. 522 of Kansas City, Kansas, of the date of September 26, 1888, regulating the running of locomotives and cars in that city, is not obnoxious and contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

5. The said Supreme Court of the State of Kansas erred in ruling and deciding in said case that ordinance No. 522 of Kansas City of the date of September 26, 1888, regulating the running of locomotives and cars in that city, is not obnoxious or contrary to the constitutional provisions of the State in not having uniform operation because of the exemption made thereby in section 8, excepting from the provisions of said ordinance No. 522 the Interstate Rapid Transit Railway Company, running engines and cars by steam—a more dangerous railroad than that operated by plaintiff in error.

6. The said Supreme Court of the State of Kansas erred in not ruling and deciding that said ordinance No. 522 of Kansas City was invalid and void because of being class legislation and in violation of that portion of the fourteenth amendment to the Constitution of the United States which ordains that "no state shall deprive any person of life, liberty or property without due process of

law, nor deny to any person within its jurisdiction the equal protection of the laws."

7. The said Supreme Court of the State of Kansas erred in deciding that the contention of the plaintiff in error to the effect that his constitutional rights were violated was without foundation, and that the proceedings in error pending in said court should be dismissed.

8. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that a trespasser upon the track and private grounds of a railroad operated by a receiver appointed by the United States court in and for the district of Kansas is entitled to the same rights and protection as a person at a public crossing of such railroad.

9. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the parents of a little child which, without the notice or knowledge of the engineer, fireman, or other trainmen operating an engine and train of cars, accidentally came out from the weeds and upon the said track in front of the approaching engine and train, and in which case the engineer, fireman, and trainman did everything in their power they could do to stop the train and prevent any accident or injury as soon as the infant was seen or known to be upon the track, are entitled to recover large pecuniary damages against the receiver of said railroad company under the charge and control of the United States Circuit Court for the District of Kan-

sas because the little child was accidentally run over and killed after it had accidentally got in front of said engine and train.

10. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that "the application of the requirements of the said ordinance to the defendant's trains, under existing conditions, was not an unreasonable restraint upon the defendant or upon commerce, although the place where the killing occurred was within the suburbs of the city and not upon a highway or street crossing."

11. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that "the failure of the defendant to observe the provisions of the ordinance by running its train within the city at a speed of fifteen miles an hour was negligence of which the deceased could have legally complained had she survived the injury, although at the time she was upon the defendant's unfenced track, not at any street crossing, and without license of the company thereto."

12. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the District Court of Wyandotte county did not commit error in receiving incompetent evidence in this case over the objections and subject to the exceptions of plaintiff in error.

13. The said Supreme Court of the State of Kansas

erred in dismissing said case and thereby ruling and deciding that the District Court of Wyandotte county did not commit error in refusing to give the instructions asked for by plainliff in error.

14. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the District Court of Wyandotte county did not commit material error in giving certain instructions, referred to in the record, over the objections and subject to the exceptions of plaintiff in error.

15. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the District Court of Wyandotte county did not commit error in overruling the motion of plaintiff in error for judgment upon the special findings of the jury.

16. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the District Court of Wyandotte county did not commit error in overruling the motion of plaintiff in error for a new trial.

17. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby affirming the judgment of the District Court of Wyandotte county in favor of the defendants in error and against the plaintiff in error.

18. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and de-

ciding that the verdict and judgment of the District Court of Wyandotte county were sustained by sufficient evidence.

19. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the verdict and judgment rendered in the District Court of Wyandotte county were not contrary to law.

20. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby ruling and deciding that the decision and judgment of the said Kansas Court of Appeals of the Northern Department, Eastern Division, were not erroneous and contrary to law.

21. The said Supreme Court of the State of Kansas erred in dismissing said case and thereby affirming the decision and judgment of the Kansas Court of Appeals aforesaid in said cause.

22. The said Supreme Court of the State of Kansas by dismissing said case erred in not reversing the decision and judgment of the said Kansas Court of Appeals aforesaid.

23. The said Supreme Court of the State of Kansas erred in dismissing said case, and thereby deciding against the contention of plaintiff in error, who claimed that his constitutional rights were violated by the decision and judgment of the District Court of Wyandotte county, State of Kansas, and further violated by the Kansas Court of Appeals aforesaid.

24. The said Supreme Court of the State of Kansas erred in dismissing said case, and in deciding that the contention of plaintiff in error, made in the Kansas Court of Appeals, was just and proper, and also in not deciding that the decision and judgment rendered herein by the Kansas Court of Appeals were proper and should be affirmed.

25. The said Supreme Court of the State of Kansas erred in not assuming and retaining jurisdiction of said case for all purposes necessary for a full and complete decision, and also erred in dismissing said case and rendering judgment against the plaintiff in error for all costs accrued in said Supreme Court, taxed at $11.00.

26. The said Supreme Court of the State of Kansas erred in rendering judgment against plaintiff in error for the full sum of $11.00, of costs, when said judgment should have been rendered against defendants in error.

And the said Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company and as a duly appointed, qualified, and acting receiver and officer of the Circuit Court of the United States for the District of Kansas, plaintiff in error, prays that the said final order and judgment of the Supreme Court of the State of Kansas may be reversed, annulled, and altogether held for naught, and that the plaintiff in error as such receiver and officer of the Circuit Court of the United States for the District of Kansas aforesaid, be restored to all things which he as such receiver and officer hath lost by occasion of such order and judgment, and for costs of suit."

Record, 108–112.

III.

ARGUMENT.

Ordinance No. 522 of the City of Kansas City, Kansas, Regulating the Running of Locomotives and Cars in the City of Kansas City, is Unconstitutional and Void, for the Reason that It Arbitrarily Excludes from Its Operation the Inter-State Rapid Transit Railway and the Engineers and Other Persons Having Charge of the Engines or Trains of that Company, and Includes All Other Railroad Companies and the Engineers and All Other Persons Having Control of the Engines or Trains Thereof.

We contend that Ordinance No. 522, of the city of Kansas City, Kansas, passed September 26th, 1888, is vitiated by the exception found in Section 8 thereof, which reads as follows :

"The provisions of this ordinance shall not apply to the Inter-State Rapid Transit Railway Company, excepting with reference to funeral or other processions."

Record, 59.

This provision of the ordinance means that the

Inter-State Rapid Transit Railway Company shall not be subject to its provisions, "excepting with reference to funeral or other processions."

Record, 59.

The evidence contained in the Record shows that at the time of the passage of Ordinance No. 522, the cars of the Inter-State Rapid Transit Railway Company were propelled in Kansas City, Kansas, by locomotives using steam.

W. S. Carroll, a witness for defendants in error, testified upon the trial concerning the Inter-State Rapid Transit Railway Company, as follows:

"Q. How long have you known of the operation of what has always been publicly known as the Elevated railroad, formerly the Inter-State Rapid Transit Railway Company?

A. Since its operation in the city. I would have to study to find out when it was started first. I have known it since it was originally operated in the city.

Q. Well, how many years has that been?

A. Seven or eight years, I should judge.

Q. Have you seen it in operation daily?

A. Almost.

* * * * * * *

Q. What kind of motive power was used by this company in June, 1888, and since that?

A. Steam motive power, if I recollect rightly."

Record, 52-53.

Otto J. Morasch, one of the defendants in error, in his testimony, referred to the Inter-State Rapid Transit Railway Company as the "dummy line."

Record, 28.

It was in front of his house about 100 feet. He said the line "was more dangerous than that," referring to the road operated by Newman Erb as receiver.

Record, 28.

W. H. H. Freeman, for the defendants in error, testified:

"Q. Well, is there much more danger from the ordinary locomotive to a person on the track than one of those dummy engines, if they do not get out of the way?

A. No; I think the dummy is as dangerous as the other.

Q. What is that?

A. I think the dummy is fully as dangerous as the other.

* * * * * * *

Q. Now, you say you think those dummies were about as dangerous as the ordinary railroad locomotive; you mean if they could run as fast?

A. No I don't. They didn't make as much noise; they crept up onto you, and more accidents happened by them."

Record, 56-58.

As above stated, it appears from the evidence that when ordinance No. 522 was passed, the Inter-State

Rapid Transit Railway Company operated its engines with steam. That road runs around Kansas City, carrying passengers to different parts of the city, starting in Kansas City, Missouri, and going out to Chelsea Park and to Edgarton, in Kansas.

Record, 57.

It is about three miles in length. When ordinance No. 522 was passed, the Inter-State Rapid Transit Railway Company had dummy engines, propelled by steam. Later, it adopted electricity. Ordinance No. 522, on account of the exception contained in section 8 thereof, exempting the Inter-State Rapid Transit Railway Company from its provisions, denied to Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, the equal protection of the laws in Kansas City, Kansas, and also forbid him as such receiver the enjoyment of the property under his control in the manner permitted to the Inter-State Rapid Transit Railway Company, and thereby deprived him of liberty in particulars of primary importance to his business, and also in his pursuit of his rights and privileges.

It was said by this court, speaking through Mr. Justice Brewer, in the case of Gulf & C. R. Co. v. Ellis, 165 U. S. 155:

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from the States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a gen-

eral proposition, this is undeniably true, * * * * yet it is equally true that such classification cannot be made arbitrarily. * * * * Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

In Vanzant v. Waddell, 2 Yerger 260, 270, Catron J. (afterwards Mr. Justice Catron of this court), speaking for the Supreme Court of Tennessee, declared: "Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law by another."

In Dibrell v. Morris' Heirs, Supreme Court of Tennessee, 15 S. W. Rep. 87, 95, Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words:

"We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural, and not arbitrary."

Cooley's Const. Lim. 393.

The Fourteenth Amendment "suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others."

Ex Parte Virginia, 100 U. S., 339;

Santa Clara County v. So. Pac. R. Co., 18 Fed. Rep. 385;

Wally's Heirs v. Kennedy, 2 Yerg., 554;

Bank v. Okely, 4 Wheat., 235;

State v. Loomis, 105 Mo., 307;

County of Santa Clara v. Rld. Co., 18 Fed. Rep., 398;

Darling v. Rogers, 7 Kan., 592.

In that case, the Herd Law act referred to, exempted six counties from the provisions of the general fence law, for five years. This was held unconstitutional and void on account of such exemption.

In Robinson v. Gray, 17 Kan., 248, the statute referred to related to sheep running at large. It exempted from its provisions Doniphan county. Therefore, the act was held unconstitutional and void.

See also—

Gray v. Crockett, 30 Kan., 138–143.

It appears from the evidence of Otto J. Morasch, the father, that the dummy line (referring to the Inter-State

Rapid Transit Railway) was more dangerous than the railroad operated by the Receiver.

Record, 28.

See—

Record, 56–58.

It also appears from the other evidence that the Inter-State Road was operated by steam motive power at the time the ordinance was passed; that the track is constructed of a "T" rail of as heavy a weight as is used generally on any of the railroads; and that the "T" rail in appearance is the same as used by the railroad operated by the defendant below.

The ordinance is class legislation. It expressly excepts from its provisions one railroad company, except as to funeral or other processions.

The fact that one railroad was excepted from the provisions of the ordinance indicates clearly that the city council was of the opinion that that road would have been included in its terms and subject to its operation, had it not been for the exception. The trains of the Inter-State road can be run at the rate of 25 miles per hour through the most crowded portions of the city, but the trains of all other railroad companies, regardless of their kind or nature, must be limited to 6 miles per hour. As respects funeral and other processions, the Inter-State road is upon no better footing than other railroad companies operating in the city.

This ordinance makes it unlawful for any person running or controlling any locomotive to permit steam to escape from the cylinder-cocks. This, however, is not applicable to persons operating or controlling locomotives of the Inter-State road; they can permit steam to escape from the cylinder-cocks whenever and wherever they please, without being amenable to the law.

It makes it unlawful for a person running a locomotive belonging to any other company than the Inter-State, to sound the whistle or allow the same to be sounded within the corporate limits of the city, except to prevent accidents and to start and stop trains, but a person running a locomotive on the Inter State road can sound the whistle as loud and as long as he pleases, on the busiest thoroughfares of the city, at any time of the day or night, without being amenable to the law.

It is made unlawful by this ordinance for any engineer, conductor or other person running a train of cars in the city, to run the same backwards without providing for a watchman on the rear end of the train. The Inter-State company is exempt from the operation of this provision of the ordinance. A train can be backed on that road at any place within the limits of the city at any rate of speed, without any watchman being stationed at the rear end of the train.

No good reason can be given why the rate of speed of the Inter-State trains should not be limited the same as that of all other trains. There is just as much danger

arising from the operation of those trains as of the trains of any other railroad company. As before stated, one of the plaintiffs testified that the Inter-State road was the "more dangerous one."

Record, 28.

They cannot be stopped with any greater facility or in any shorter space than the trains of other companies can be stopped. The inconvenience arising from the escaping steam is just as great whether it escapes from the cylinder-cocks of locomotives on the Inter-State road, or locomotives upon some other road. It is just as dangerous to back trains upon the Inter-State road without a watchman upon the rear end as it is to back trains upon any other railroad without a watchman.

Furthermore, in the course of time, there may be constructed and operated within the limits of the city, a dozen different lines operated exactly as the Inter-State road was operated at the time this ordinance was passed. For aught that appears in the testimony, there may have been a number of other railroads of a similar nature to the Inter-State road within the limits of Kansas City, Kansas, at the time this case was tried and the time the ordinance was passed. Yet the ordinance would apply to all such roads, and would except the Inter State road only.

The ordinance does not except from its provisions all roads operated with dummy locomotives or operated as the

Inter-State road was operated. It excepts that particular road, and no other, and it excepts it by name.

In Gillette v. Topeka, 32 Kan., 431, it was decided "that an act of the legislature may be special where it applies to any particular and existing persons or things, as well as where it applies to one only," and in that case the act was held unconstitutional and void.

For the same reason and for other reasons hereinafter stated, said ordinance No. 522 must be held unconstitutional and void.

A statute would be unconstitutional which selects particular individuals from a class or locality and subjects them to peculiar rules or imposes upon them special obligations or burdens, from which others in the same locality or class are exempt.

Railway Co. v. Ellis, *supra;*

Gillette v. Topeka, *supra;*

Cooley's Cons. Lim., 6th Ed., 479, 482, 483 and notes.

See, also, the following cases where acts of Legislatures have been held unconstitutional as class legislation:

Wages Law of Missouri of 1885, applying to manufacturers, and mine-owners. (State v. Loomis, 115 Mo., 307.)

State v. Goodwill, 33 W. Va., 179.

The Eight-Hour law of Nebraska, of 1891, excluding

farm hands, (Low v. Printing Company, 41 Neb., 127).

Same ruling as to the Eight-Hour law of Colorado, of 1895, concerning special industries. (*In re* Eight Hour law, 39 Pac. Rep., 228.)

Mining law of Illinois, of 1883 and 1885, as to weighing scales, etc. (Millette v. People, 117 Ill., 294.)

State v. Sheriff, 48 Minn., 236.

Law of California, of 1893, relating to the classification of cities. (Darcy v. Mayor, 38 Pac. Rep., 500.)

An Act of Ohio, of 1888, applying to a city. (City of Cincinnati v. Steinscamp, 43 N. E., 490.)

City ordinance relating to Sunday law excluding Jews. (*City of Shreveport v. Levy, 26 La. Ann., 671.*)

The following cases follow the decision of the Supreme Court of Kansas in Gillette v. Topeka, 32 Kan., 431:

State v. Simon, 22 Atl., Rep., 120;

State v. Hammer, 42 N. J., Law., 435;

State v. Smith, 26 N. E. Rep., 1069;

Harding v. People, 160 Ill., 459;

Walley's Heirs v. Kennedy, 2 Yerg., 554;

Lewis v. Webb, 3 Me., 326;

Holden v. James, 11 Mass., 396;

Piquet, Etc., 5 Pick., 65;

Nichols v. Walter, 37 Minn., 264;

State v. Coal Co. (W. Va.), 10 S. E., 288;

Braceville Coal Co. v. People, (Ill.), 35 N. E., 62;

County of Santa Clara v. Southern Pacific Ry. Co., 18 Fed., 385;

Darling v. Rogers, *supra;*

Robinson v. Perry, *supra;*

Mo. Pac. Ry. Co. v. Mackey, 127 U. S., 205.

That corporations are "persons" within contemplation of the constitutional provision, see:

Railway v. Ellis, *supra.*

Mo. Pac. Ry. Co. v. Mackey, 127 U. S., 209.

Santa Clara Co. v. So. Pac. Ry. Co., 118 U. S., 394.

That municipal corporations are bound by these constitutional provisions, see:

Gen. Statutes for 1889, par. 555;

Cooley's Const. Lim., 198.

That the clause excepting the Inter-State road cannot be disregarded and the balance of the ordinance held good, see:

C. B. U. P. Rld. Co. v. A. T. & S. F. Rld. Co., 28 Kans., 453;

Fletcher v. Peck, 6 Cranch, 87;

Calder v. Bull, 3 Dall., 386;

Booth v. Woodbury, 32 Conn., 118;

Lin Sing v. Washburn, 20 Cal., 534;

Holden v. James, 11 Mass., 396;

Davidson v. Johonnot, 7 Metc., (Mass.) 396;

Bull v. Conroe, 13 Wis., 233;

Walley's Heirs v. Kennedy, 2 Yerg., (Tenn.) 554;

The King v. Pease, 1 Nev. & M., 690;

4 Barn. & Adol., 30;

Vaughan v. Taff Vail Rly. Co., 5 H. & N., 678;

Cleveland & Pittsburgh Rld. Co. v. Speer, 56 Pa. St., 325;

Clark v. Mayor, Etc.. of Syracuse, 13 Barb., (N. Y.) 32.

The questions with reference to the constitutionality of this ordinance were raised in various ways: By objection to the introduction of the ordinance "as incompetent, irrelevant, immaterial and not properly set up in the petition;" because the ordinance was void upon its face for the reason that it excepts the Inter-State Rapid Transit Railway Company from the operation thereof; because the ordinance only fixes a penalty upon the engineer, who should violate it, and fixes no penalty upon the railroad company using or operating the engine; and because the ordinance should be held invalid as to that portion of the city where the accident occurred, as it would be a restraint upon trade and commerce to en-

force the same in accordance with the provisions thereof; by excepting to instruction No. 4 of the court, with reference to it; by a motion for a judgment in the case, and by a motion for a new trial.

If ordinance No. 522 be eliminated from this case, then, under the petition and the findings, the plaintiffs below are not entitled to any recovery.

The validity of the ordinance must be decided of the date of its passage, to-wit: September 26th, 1888. It must be considered with the conditions then existing. Any subsequent change in the operation of the Inter-State road is wholly immaterial and irrelevant.

In the case of Pennsylvania Company v. Frana, 13 Ill. App., 91, it is decided "that the validity of an ordinance of a city stands on the same footing as a statute. Therefore it is error to leave it to the jury to determine the applicability of an ordinance relating to the running of trains on the streets to circumstances and its legal effect. It presents a question of law." Ordinance No. 522 was valid when it was passed, on September 26th, 1888, or it was then wholly unconstitutional and void. Subsequent circumstances could not render it valid.

Evidence was received to show that in June, 1893, the Elevated Railroad used electricity as a motive power.

That was wholly immaterial to all the issues of this case, and incompetent. The city ordinance of 1888 could not be affected by any subsequent change of motive power, and therefore what motive power the Elevated

Railroad, or any other road, used in 1893, was wholly immaterial, but prejudicial to the plaintiff in error.

The case of Railroad Company v. Richmond, 96 U. S., 521, is not applicable. In that case, "the ordinance, while apparently limited in its operation, was in effect general, as it applied to all who could do what was prohibited." When the railroad company in that case desired to run its trains through the street of Richmond referred to in the decision, a request was made by the company of the city to approve its location. This the city was willing to do upon condition, however, that it would not part with its control of the particular railroad making the request. By the conditions imposed upon the railroad company by the city in approving its location, the city reserved certain powers of control, and under such reservation the ordinance in that case was held valid.

Again, in that case, no other person or corporation had any right to run locomotives on Broad street excepting the Richmond, Fredericksburg & Potomac Railroad Company. On this account, the ordinance construed in that case applied to all who could do what was prohibited. The facts in this case are very different from that. We therefore earnestly insist that Ordinance No. 522 discriminates between the Inter-State Railway Company and the other railroad companies operating in Kansas City, Kansas, and thereby infringes the provision of the Constitution of the United States which guarantees to all persons the equal protection of the laws.

IV.

Under the Construction Given to Ordinance No. 522 by the Supreme Court of the State of Kansas, Newman Erb, as Receiver of the Federal Court, Exercising Authority Under the United States, is Erroneously Made Liable to a Third Party Upon an Ordinance of the City of Kansas City, Kansas, Regulating the Speed of Railroad Trains.

It appears from the record that Newman Erb was appointed on March 21st, 1890, by the United States Circuit Court in and for the District of Kansas, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company.

Record, 10.

The accident whereby Irene Morasch lost her life occurred on June 16th, 1893, while Erb was receiver, operating the Kansas City, Wyandotte & Northwestern Railroad Company, under the authority of the Circuit Court of the United States for the District of Kansas. The damages recovered in the trial court were wholly based upon the ground that the receiver of the railroad company violated the provisions of said Ordinance No. 522, regulating the running of locomotives and cars in Kansas City, Kansas. We insist that the defendants in error could not found an action against Erb as receiver upon said Ordinance No. 522.

In the case of Sanders v. Southern Electric Railway Co., 147 Mo., 411, (1898) in which the petition charged an electric railway company with negligence in the violation of an ordinance requiring the motorman to "keep a vigilant watch for all vehicles on the track or moving toward it, and on the first appearance of danger to such vehicle, to stop the car in the shortest time and space possible," the court held that this was not a statement of the cause of action, and the judge delivering the opinion says:

"The legislature may delegate a part of the police power of the state to a municipality, but it cannot delegate the legislative functions of making laws that will be binding upon citizens between themselves in civil proceedings. The police regulations control the citizen in respect to his relations to the city, representing the public at large, and for this reason are enforcible by fine and imprisonment, but laws controlling the liability of citizens *inter sese* must eminate from the legislature, in whom, alone, such power is vested by the Constitution."

This case is referred to in Byington v. R. R. Co., 678 of same volume, (1899), which was an appeal from an order granting defendant a new trial, and, in affirming the action of the lower court in ordering such new trial, the judge delivering the opinion of the court says:

"It is not affirmed, however, for the reason stated by the Circuit Court in granting a new trial, that the injury complained of is the direct result of the violation of the said ordinance, but because of the fact that the City of St. Louis has no power to prescribe by ordinance a rule of conduct that will afford the basis of civil liability from one citizen to another, and because, while it has authority, under its delegated police power, to adopt police regulations, and to punish their infraction by fine and imprisonment, such regulations cannot confer a civil right of action upon one person against another.

It makes no difference, therefore, whether the 'injury is the direct result of a violation of' a municipal ordinance or not, for such ordinance can neither be the corner stone of liability nor evidence of common law negligence. These principles of law are as old as the law itself, and have been pointed out and enforced in this state and in other states on many occasions prior to the decision in Sanders case."

Citing, Norton v. St. Louis, 97 Mo., 537.

In an earlier case, Fath v. Tower Grove & La Fayette Rly. Co., 105 Mo., 537, (1891), Judge Sherwood, for the court, says:

"Proceeding, then, to inquire into the validity of the ordinance, it may be admitted at the outset that it is beyond the power of a municipal corporation by its legislative action directly to create a civil duty enforcible at common

law,' for this is an exercise of the power of sovereignty belonging alone to the State."

In the case of Sanders v. Railway Co., *supra*, Judge Marshall, referring to the averment in the petition, that "the defendant in consideration of the grant of the City of St. Louis, of its franchise to operate its railway and cars as aforesaid, undertook and agreed to obey the provisions of said ordinance aforesaid, and the defendant, at said time, had taken out a license from the City of St. Louis to operate said cars," says:

"This allegation was necessary to the statement of the cause of action predicated upon the ordinance. It required the ordinance and the contract both to constitute a cause of action. This precise ordinance regulation underwent adjudication by this court in Fath v. T. G. & L. R. R. Co., 105 Mo., 537. * * * * * The agreement of the defendant to comply with the ordinance provisions in question was held to create a contractual liability on the part of the defendant which did not exist at common law, and without which the city was without power to bind the defendant. The conclusion reached in that case was approved in Senn v. Southern Ry. Co., 108 Mo., 9, 152. The petition stated a cause of action, but the proof failed to make out the *prima facie* case. * * * * The mere fact that the defendant was operating street cars upon the streets of the city, does not establish the allegation that it does so under a grant or license of the city, *non constat* it may have acquired the right from the State prior to the adoption of the Constitution of 1875; nor that the city in consideration of the grant required the defendant to so agree; nor that the defendant has so agreed. The contention that the city has the right, under its police power to adopt the ordinance, is not tenable."

In the case of Murphy v. Lindell Ry. Co., 54 S. W.

Rep., 442, (1899), Judge Brace, delivering the opinion of the court, says:

"* * * * We have twice, and quite recently, held before this in regard to this identical ordinance, that, as it creates a new and different standard for measuring the liability of citizens in this state in the City of St. Louis from that prescribed by the 'law of the land,' it could be enforced only against those who accepted its provisions for a consideration,"

and quotes from Sanders v. Rly. Co., *supra*,

"Though the ordinance was allowed to go in evidence without objection, that, alone, would not make out a case of legal liability. It required proof of the allegation that the defendant agreed to be bound by it."

The Judge further says:

"In the former case, (Fath v. Ry. Co., 105 Mo., 537), it was admitted in the opinion that it is beyond the power of a municipal corporation, by its legislative action, directly to create a civil duty enforcible at common law, for this is an exercise of power of sovereignty of the State; but it was held that such a liability might be created by a contract between the defendant and the city by which the former, in consideration of the franchise granted by the city of laying its tracks on the street, agreed to yield obedience to the ordinance. These cases are decisive of the one in hand. As the instructions given for the plaintiff authorized a recovery upon proof of a breach of the ordinance without any proof of the acceptance of its provisions by the defendant, there was fatal error in giving them. Although the plaintiff, doubtless upon the faith of one of those cases, framed the issue which he tendered, alleging such acceptance, yet, having failed to prove it, he now asks that those cases be overruled, and the doctrine of these instructions

be established as the law of this court. This demand could not be granted upon the ground of any different ruling upon this ordinance in other cases, for, as was said in the *Fath* case, although the ordinance has been in existence for over thirty years, its legal validity has never been adjudicated by this court, though incidentally touched upon in several instances."

Referring to the point made by counsel for the plaintiff, that the validity of the ordinances, as affording causes of action, has been frequently recognized by the court heretofore, the Judge, continuing, says :

"That it is not the point in question here,—it is not the validity of the ordinance, but its effect upon the rights of the defendant in a civil action."

In this case, there was no evidence offered or admitted showing or tending to show that neither Newman Erb, as receiver of the Kansas City, Wyandotte & Northwestern Railroad Company, nor the Kansas City, Wyandotte & Northwestern Railroad Co. accepted ordinance No. 522 as a condition or as a consideration for the granting any franchise or permission to operate the road in the city of Kansas City. Ordinance No. 522 was not only offered as evidence of the negligence of plaintiff in error, but as the corner stone of his liability as receiver. All of this was erroneous.

We therefore insist that said ordinance was erroneously received as evidence by the trial court, and that it was not binding in any way upon the plaintiff in error. The ordinance ought not to have been considered as

affecting the rights of plaintiff in error by the Supreme Court of Kansas. We therefore contend that the judgment of that court must be reversed.

Respectfully submitted,

B. P. WAGGENER and
ALBERT H. HORTON,
Attorneys for Newman Erb, as Receiver, Plaintiff in Error.

March 8th, 1900.

No. 249.

FILED
APR 30 1900
JAMES H. McKENNEY,
Clerk

Brief of Horton & Waggener for

—IN THE—

Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed April 30, 1900.

NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company,

Plaintiff in Error,

vs.

OTTO J. MORASCH and ELIZA MORASCH, as next of kin of IRENE MORASCH, deceased,

Defendants in Error.

No. 249.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

Brief of Plaintiff in Error in Reply to Brief Filed by Defendants in Error.

ALBERT H. HORTON,
B. P. WAGGENER,
Attorneys for Plaintiff in Error.

Woodhouse & Schauer, Printers, Atchison, Kansas.

—IN THE—

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NEWMAN ERB, as Receiver of the Kansas City, Wyandotte & Northwestern Railroad Company,
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vs.
OTTO J. MORASCH and ELIZA MORASCH, as next of kin of IRENE MORASCH, deceased,
Defendants in Error.

No. 249.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

Brief of Plaintiff in Error in Reply to Brief Filed by Defendants in Error.

It is stated in brief of defendants in error, page 12, that :

"It will not be contended by opposing counsel but that the city had power under legislative authority to enact police regulations to govern the speed of trains within its corporate limits."

"Some surprise may justly be manifested at the position taken in the brief."

It is provided by Section 1, Article 2, of the Constitution of the State of Kansas, that:

"The legislative power of this state shall be vested in a house of representatives and senate."

And it is also provided by Section 5, Article 12, of the Constitution of the State of Kansas, that:

"Provisions shall be made by general law for the organization of cities, towns and villages, etc.; and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit shall be so restricted as to prevent the abuse of such power."

There is no clause or provision in the constitution authorizing the legislature to delegate any of the legislative power vested in it by Section 1, Article 2, of the constitution, cited *supra*.

The ordinance in question was enacted in pursuance of the twenty-first sub-division of Section 11, Article 3 of Chapter 18 of "An Act to incorporate and regulate cities of the first class, and to repeal all prior acts relating thereto," General Statutes of Kansas, 1899, page 161.

Our contention is:

First. That the passage of the ordinance in question was the exercise, by the city council of Kansas City, Kansas, of a legislative power, which, by Section 1, Article 2, of the constitution, is vested exclusively in the house of representatives and senate of the State of Kansas, and that notwithstanding the provision of the

charter of cities of the first class, to which attention has been called, the legislature did not have constitutional power to delegate to the mayor and council the power of legislating, with reference to the subject matter of the ordinance.

Second. If, however, we are mistaken in this, and it shall be held that the passage of the ordinance was the proper exercise of delegated power on the part of the mayor and council of the City of Kansas City, Kansas, then we insist that it is solely a police regulation, and cannot be made either the basis of a cause of action for damages, or a rule of evidence in an action based upon a common law right. In addition to the authorities referred to in original brief, to which reference is made, we invite the attention of the court to the following, namely:

In the case of Jenks vs. Williams, 115 Mass., 217, it was held, that:

"The ordinance of the City of Boston of 1850, imposing penalties for making and maintaining bow-windows or other projections into the streets of Boston, are intended for the benefit of the public, and do not confer distinct rights on individual citizens or owners of property."

In the case of Flynn vs. Canton Co., 40 Md., 312, the action was grounded on the neglect of the appellees to comply with an ordinance of the city, which made it the duty of the owners or occupiers of property to clear away snow and ice from the pavements or sidewalks

contiguous to their premises, under a penalty of two dollars for every neglect, besides the expense of clearing the same away under the direction of police officers, in the mode provided in the ordinance, it was *held*:

"That the action would not lie; that the neglect of the defendants to perform the duty or service imposed on them by the ordinance, did not render them liable to a private action; that the only liability resting upon them was that imposed by the ordinance itself, namely; the prescribed fine or penalty for each neglect, and the cost of removal in every instance of their refusal or neglect."

The action of the plaintiff was either a common law action, or based upon the violation of the provisions of the ordinance, for there is no statute of the State of Kansas providing for such an action. If the action was not based upon the ordinance, the defendant company was liable for the injury or not, irrespective of the ordinance. Counsel in their brief contend that the ordidance was "merely evidence of negligence." In other words, that the city council had the power to pass an ordinance fixing a rule of evidence to determine the question of liability or non-liability in a common law action for negligence. Let us suppose that if there had been no ordinance that no common law action would lie; would disobedience to the regulations of this ordinance, of itself, subject the company to an action? This question would seem almost to answer itself, for if it be affirmed then may civil duties and civil remedies be given or taken away by ordinance; a power as yet quite beyond the reach of municipal legislation. The national or state legisla-

ture may do this, for it is the supreme power, and as such can make that immoral which was before indifferent, and that neglect which was before prudence; but the city of Kansas City, Kansas, had no such power. Its ordinances are but police regulations, enforceable by penalties, recoverable by actions of debt or otherwise as may be prescribed, but if not so enforced they come to nothing. An ordinance may forbid an assault and battery, yet if A unlawfully assaults B, and B brings an action at common law to recover damages for such unlawful assault, would the ordinance prohibiting assault be competent evidence in favor of B on the trial of such common law action?

In the case of Vandyke vs. Cincinnati, Disney (Ohio Report), 532, the court, considering a similar question, said:

"I conclude then, that the ordinance imposed upon Harrison a public duty alone, which can only be enforced by the penalty prescribed and non-performance of which does not subject him to a civil action at the suit of a person injured."

In the case of Heeney vs. Sprague, 11 R. I., 456, it was held, that:

"A violation of a duty imposed by a municipal ordinance, and sustained by a fine, will not support an action on the case for special damages in favor of one injured by the violation and against the violator."

Hickok vs. Trustee, 16 N. Y., 161;

Eastman vs. Meredith, 36 N. H., 284.

Section 7 of the ordinance provides, that :

"Any person violating any of the foregoing sections, or the provisions of any of them therein contained, upon conviction before the police judge, shall be fined in the sum not exceeding one hundred dollars."

The court below, by construction, places in the ordinance another penalty or burden, namely, that if any engineer of any railway company shall violate any of the provisions of this ordinance, then and in that event his violation of the ordinance shall be evidence of negligence on the part of the company, which may be used in an action at common law to recover damages sustained in consequence thereof. If the city council has the right to prescribe what shall constitute a rule of evidence, may it not also provide by ordinance, in the nature of penalty or fine for its violation, that any party injured as a result thereof may have an action against the violator of the ordinances? In a case, and under circumstances where there would be no action at common law, can the legislature, under a constitutional provision like the one to which the attention of the court has been called, delegate to a municipal body any such power or authority, and if it has in terms attempted to delegate such power or authority, would ordinances passed in pursuance of such delegated power, prescribing rights and providing remedies, afford that due process of law guaranteed by the constitution of the United States ?

In the case of Saunders vs. Southern Electric Ry.

Co., 147 Mo., 411, it was said by the court:

"The legislature may delegate a part of the police power of the state to a municipality, but it cannot delegate the legislative functions of making laws that will be binding upon citizens between themselves in civil proceedings."

The contention of counsel for defendant in error that the ordinance was used "merely as evidence of negligence" is not sustained by the record. An examination of the instructions of the court (record 76) will disclose the fact, that the court in its charge to the jury referred to the ordinance which limited the rate of speed to six miles an hour, and stated that:

"Such act of the persons in charge of said train is evidence of negligence on the part of said defendant," but did not stop there, but further instructed the jury as follows:

"And if you further find that but for such speed so running in excess of six miles an hour, said train could have been stopped by the engineer in charge thereof, after he saw the child upon the track, or by the exercise of ordinary care and prudence could have seen her upon such track and before the engine would have reached her, then said defendant will be liable for the injuries so received."

The court, by this instruction, not only makes the violation of the ordinance *evidence* of negligence, but instructs the jury that if the engineer was running at a greater rate of speed than six miles an hour, that that fact in law constitutes negligence, for which the defendant

would be liable if an injury resulted in consequence thereof. The jury was not permitted to determine the question of negligence regardless of the ordinance, but the arbitrary rule was announced that the violation of the ordinance constituted actionable negligence, for which the defendant company was liable. The legislature of the State of Kansas has nowhere provided that any rate of speed of a railroad train is negligence *per se*, but the city council of Kansas City, Kansas, has enacted an ordinance, in the exercise of its power of police regulation, limiting the rate of speed of a train within the corporate limits to six miles an hour, which the court below held, in and of itself, constituted actionable negligence. If the action was not based upon the ordinance, and the recovery had because of its alleged violation, it is difficult to understand what is meant by the record in this case.

Another thing to which the attention of the court is respectfully called, is the fact that this accident occurred on the private property of the defendant company, and the ordinance is made to apply just the same as on a public street or a public street crossing.

ALBERT H. HORTON,
B. P. WAGGENER,
Attorneys for Plaintiff in Error.